Robert Dewey Glock, II vs Michael Moore etc.,

GOOD AFTERNOON. WE ARE HERE FOR ORAL ARGUMENT IN THE CASE OF GLOCK VERSUS MOORE, GLOCK VERSUS THE STATE. MS. BACKHUS.

MAY IT PLEASE THE COURT, MY NAME IS TERRI BACKHUS. I'LL BE REPRESENTING ROBERT DEWEY GLOCK II ON THE CASE TODAY. WE'RE BEFORE THE COURT ON SUMMARY DENIAL OF A SUCCESSOR RULE 358.0 MOTION AND ON A STATE HABEAS PETITION THAT WAS FILED UNDER THE INVOCATION OF THE ALL RICH JURISDICTION OF THIS COURT. MR. GLOCK IS ABOUT TO BE EXECUTED BECAUSE HE HAD A GOOD LAWYER. AND ONE OF THE PROBLEMS THAT HE HAD WAS THAT HIS LAWYER UNDERSTOOD THAT WHEN THIS COURT FOUND A JURY INSTRUCTION SUCH AS HEINOUS, ATROCIOUS AND CRUEL TO BE CONSTITUTIONAL, THAT IT WOULD HAVE BEEN FRIVOLOUS FOR HIM TO RAISE THAT ISSUE BEFORE THIS COURT. BECAUSE THAT CLAIM HAD BEEN DEEMED NOT TO BE MERITORIOUS BY THE COURT. HAD MR. GLOCK HAD AN ATTORNEY SUCH AS MR. DAVIDSON JAMES DID AND HAD HE HAD AN ATTORNEY WHO WAS PERHAPS NOT AS WELL INFORMED AS THE ONE HE HAD, WHO DID NOT KNOW ABOUT THE COURT'S RULINGS REGARDING THE CONSTITUTIONALITY OF THE HEINOUS, ATROCIOUS AND CRUEL JURY INSTRUCTION. AND DID NOT KNOW THAT RAISING THAT CLAIM BEFORE THIS COURT WAS A FRIVOLOUS ACTION, BECAUSE HE HAD THE LUCK OF HAVING THAT TYPE OF A LAWYER, HE IN TURN HAD THE BENEFIT OF GETTING RELIEF IN THIS CASE. SO THAT'S BASICALLY --. ISN'T THAT CLAIM REALLY ESSENTIALLY DISPOSED OF BY REALLY WHAT OCCURRED IN THE LAMB BREKT SERIES OF CASES? IN LAMBRECHT THE ISSUE WAS PRE-SERND IN THE TRIAL COURT, WAS NOT RAISED ON DIRECT APPEAL. THAT WAS GONE UP TO THE UNITED STATES SUPREME COURT AND THE CONCEPT THAT SOME PEOPLE GET THE BENEFIT, SOME DEFENDANTS OF CERTAIN RULINGS AND OTHERS DON'T DOESN'T EVER SEEM TO BE SOMETHING THAT THE UNITED STATES SUPREME COURT HAS SAID WOULD RESULT IN AN UNCONSTITUTIONAL APPLICATION OF THE DEATH PENALTY PENALTY.

WELL ACTUALLY NO, I DON'T THINK IT WAS. LAMBRECHT BASICALLY DEALT WITH THE FEDERAL COURT'S INTERPRETATION OF WHAT WOULD BE APRIL OLYMPICAL FEDERAL 2254 LAW. THEY FELT THEY COULD NOT GIVE RETROACTIVE APPLICATION UNDER 2254 AND RECOGNIZE THAT CLAIM AS VALID UNDER FEDERAL LAW.

BUT THEY ALSO ADDRESSED THE FACT WE HAD FOUND A PROCEDURAL BAR IN LAMBRECHT IN COLLATERAL PROCEEDINGS. YOUR CLAIM WOULD ESSENTIALLY BE THAT UNLESS WE GO AHEAD AND REVERSE EVERY CONVICTION IN WHICH THE HEINOUS, ATROCIOUS AND CRUEL INSTRUCTION PRIOR TO ES PI KNOWS SA WAS GIVEN, WE WILL BE APPLYING THE DEATH PENALTY UNCONSTITUTIONALLY, CORRECT?

EXACTLY. EXACTLY. THAT'S THE CLAIM. BASICALLY THAT IF THE APPLICATION OF LAW AS THIS COURT INTERPRETS IT IS CONSISTENT WITH WHAT THE FEDERAL COURT DID, AND I'M NOT SAYING THAT IT IS, BECAUSE I THINK THAT WAS A FEDERAL COURT INTERPRETATION OF FEDERAL LAW, THAT THIS COURT HAS A DIFFERENT SET OF STANDARDS, AND IS THE HIGH COURT IN INTERPRETING ITS OWN LAW.

THIS COURT HAS BEEN VERY CLEAR THAT UNLESS IT IS RAISED BOTH IN THE TRIAL COURT AND ON DIRECT APPEAL, THAT WE WILL NOT APPLY ESPINOZA RETRO ACTIVELY.

THAT'S CORRECT.

EVEN IF WE DID YOU COULD HAVE TO SURVIVE A HARMLESS ERROR ANALYSIS. IN THIS CASE THE TRIAL COURT DIDN'T EVEN FIND THE HACKING A VA ORS.

IT'S THE SAME SITUATION THAT HAPPENED IN THE DAVIDSON JAMES CASE WHERE THE HAC AGRI VATING FACTOR WAS STRUCK.

-- AGGRAVATING FACTOR.

ARE YOU GOING TO ALSO ADDRESS YOUR ISSUES ON THE 3.850?

YES, I INTEND TO ADDRESS THEM ALL.

I HAVE A COUPLE OF VERY SPECIFIC QUESTIONS.

OKAY.

ON THE CLAIM OF PROFILING THAT YOU ARE RAISING AS A NEWLY DISCOVERED EVIDENCE CLAIM, IS YOUR CLAIM ONE OF A IMPERMISSIBLE RACIAL PROFILING, OR IMPERMISSIBLE DRUG PROFILING?

ACTUALLY, I THINK IT'S THE SAME THING.

MOST RESPECTFULLY, I DON'T KNOW THAT IT'S THE SAME THING, BECAUSE A CLAIM OF IMPERMISSIBLE RACIAL PROFILING WOULD ARISE UNDER THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT. I DON'T KNOW OF ANY LAW THAT WOULD SAY THAT IF THERE'S AN OTHERWISE PERMISSIBLE REASON FOR STOPPING SOMEBODY, THE FACT THAT THERE MAY HAVE ALSO BEEN DRUG PROFILING GOING ON WOULD RISE TO AN EQUAL PROTECTION VIOLATION UNDER THE 14TH AMENDMENT. WOULD YOU AGREE WITH THAT?

YES, I CERTAINLY UNDERSTAND WHAT YOU'RE SAYING BUT I THINK THERE -- AND IT'S KIND OF A MISNOMER TO CALL IT EITHER THING. BASICALLY, THE RACIAL PROFILING THAT OCCURRED IN NEW JERSEY WAS DONE WITH THE PURPOSE OF STOPPING THE DRUG TRAFFICKING THAT THEY PERCEIVED WAS COMING FROM THE STATE OF FLORIDA. SO BASICALLY THAT WAS A PART OF THE PROFILE, BUT IT HAS BECOME A PREDOMINANT PART.

AND ISN'T IT A PROBLEM THAT YOUR CLIENT IS NOT A MEMBER OF THE PROTECTED CLASS, IN THAT HE IS NOT A RACIAL MINORITY EVEN TO GET TO THRESHOLD ON THIS SHOWING ASSUMING THERE WAS A DUE DILIGENCE BAR?

NO, NOT AT ALL. AND IF YOU'LL LOOK AT SOME OF THE EXCERPTS OF SOME OF THE DOCUMENTS THAT I QUOTED IN THE INITIAL BRIEF, IT BECAME MORE AN INSTANCE OF NOT JUST BEING ONE PARTICULAR RACE THAT WAS BEING PROFILED. IT WAS HISPANICS, BLACKS, IT WAS ITALIANS, CHINESE. AS WE GOT INTO THE DOCUMENTS THAT HAD BEEN DISCLOSED IN NOVEMBER, WE FOUND THAT THERE WERE MORE RACES THAT WERE BEING PROFILED, AND OF COURSE, ONE OF THE TWO MEMBERS OF THE PARTY MR. PUIATI IS ITALIAN-AMERICAN WHICH IS ONE OF THE ETHNIC GROUPS THAT THEY WERE TARGETING AT THE TIME. AND IT WAS OUR POSITION THAT WE ADD PLED SUFFICIENT FACTS TO WARRANT AN EVIDENTIARY HEARING. AND CERTAINLY WITH THE DOCUMENTS THAT HAD BEEN PROVIDE TO US FROM NEW JERSEY, IT WAS OBVIOUS THAT THERE WAS A PATTERN OF CHOOSING -- PICKING AND CHOOSING DIFFERENT RACES AS THE BASIS FOR THE STOP. THE PURPOSE OF THE STOP OF COURSE WAS TO STOP THE DRUG TRAFFICKING THAT WAS OCCURRING. BUT ONE OF THE COMPONENTS OF THE PROFILE WAS RACE. AND THERE WERE OTHER COMPONENTS, AS WELL. SUCH AS AGE, DIRECTION THEY WERE TRAVELING, WHAT STATE THE LICENSE PLATE CAME FROM. AND IT WAS ALL THESE THINGS IN COMBINATION THAT MADE UP THE DRUG PROFILE. HOWEVER, IT WAS THE RACE ISSUE THAT WAS ONE IN WHICH THAT WAS ALMOST THE TRIGGERING EVENT AS TO WHETHER OR NOT PEOPLE WILL BE PUGD OVER ON

THE NEW JERSEY TURN PIKE. AND I THINK WE HAD PLED AFFIDAVITS FROM TROOPERS AND FROM OTHER SOURCES THAT SHOWED THAT THE PROFILING THAT WAS OCCURRING WAS OVERWHELMINGLY OCCURRING ON RACIAL MINORITIES. NOW, MR. GLOCK AND MR. PUIATI AS I SHOWED IN THE INITIAL BRIEF WERE BOTH DARK AT THE TIME OF AT THE TIME OF THEIR ARREST.

IS MR. GLOCK A MEMBER OF ANY CLASS RECOGNIZED AS A PROTECTED CLASS IN THE EQUAL PROTECTION ANALYSIS?

NO, YOUR HONOR, HE'S CAUCASIAN. HE WAS NOT TO MY KNOWLEDGE ITALIAN-AMERICAN. HOWEVER, WHETHER HE REALLY WAS A MEMBER OF THAT GROUP OR NOT, IT'S BASICALLY - THE PERCEPTION OF THE TROOPER WHEN HE'S PULLING THEM OVER.

SO THAT WOULD GO TO -- THAT GOES BACK TO THEN IT'S REALLY A 4TH AMENDMENT CLAIM YOU'RE RAISING. YOU'RE NOT TRYING TO RAISE A 14TH AMENDMENT EQUAL PROTECTION CLAIM.

I THINK IT'S BOTH.

HOW CAN SOMEBODY WHO YOU'RE SAYING IS NOT A MEMBER OF A PROTECTED CLASS BE ABLE TO CLAIM SELECTIVE ENFORCEMENT UNDER THE 14TH AMENDMENT WHEN THE PERSON IS NOT A MEMBER OF THAT PROTECTED CLASS?

WELL, I THINK THAT THE STOP WAS BASED ON THE PERCEPTION THAT HE WAS A MEMBER OF THE CLASS. AND THE OTHER PERSON IN THE CAR WAS A MEMBER OF THE CLASS AND THERE WAS A CASE THAT I CITED IN THE INITIAL BRIEF, THE LETZ CASE WHICH HAD THIS VERY SAME SCENARIO. THERE WERE TWO CO-DEFENDANTS IN THE CASE. ONE DEFENDANT WAS WHITE, THE OTHER WAS BLACK. AND THE NEW JERSEY COURT FOUND THAT IT DIDN'T MATTER THAT ONE OF THE MEMBERS WAS BLACK. THE FACT THAT THEY HAD USED THAT RACIAL PROFILING IN THE STOP MADE THE STOP BAD FOR CONSTITUTIONAL PURPOSES. IT WAS A VIOLATION AND THEY SUPPRESSED THE EVIDENCE IN THAT CASE. AND SO I THINK THAT'S THE BASIS. THAT'S THE BASIS FOR THE CLAIM. IS THAT THERE WAS A 4TH AMENDMENT VIOLATION. BUT THE MANNER IN WHICH THE 4TH AMENDMENT VIOLATION AROSE ROSE TO THE LEVEL OF A 14TH AMENDMENT VIOLATION.

WAS THE PRO PRY TIR OF THE LEGALITY OF THE STOP RAISED AS AN ISSUE ON DIRECT APPEAL?

MY UNDERSTANDING FROM WHAT WAS RAISED IN THE DIRECT APPEAL WAS THAT THERE WERE ONLY TWO ISSUES RAISED ON DIRECT APPEAL REGARDING THE GUILT PHASE. AND I DON'T BELIEVE THE STOP WAS ONE OF THOSE ISSUES. AS I SHOWED IN THE INITIAL BRIEF THE DEFENSE ATTORNEYS IN QUESTIONING TROOPER MOORE, WHO WAS BASICALLY THE ONLY WITNESS THEY HAD TO QUESTION, DIDN'T HAVE AT THEIR DISPOSAL ALL OF THE INFORMATION THAT WE NOW HAVE TODAY. THEY HAD MADE PRELIMINARY QUESTIONS OF THAT OFFICER AS TO WHAT HIS BASIS WAS FOR STOPPING THESE TWO MEN. AND IT'S OUR POSITION THAT HAD THEY HAD THIS INFORMATION --

WHAT HAPPENED WHEN THEY ASKED THOSE QUESTIONS? THEY WERE OBJECTED TO?

CERTAINLY IN DEPOSITIONS IN MR. PUIATI'S DEPOSITION THERE WERE OBJECTIONS BY THE STATE.

WERE THEY ALLOWED TO ASK?

THEY WERE PURSUED AT TRIAL IN WHICH HE TESTIFIED THAT THE REASON HE PULLED THEM OVER WAS BECAUSE OF THE LICENSE TAG. BUT IF YOU WILL LOOK AT THE DOCUMENTS THAT HAVE RECENTLY BEEN DISCLOSED THAT WAS KIND OF THE MODUS OPERANDI FOR A RACIAL PROFILING CASE WAS TO FIND SOME TYPE OF MOTOR VEHICLE INFRACTION TO MAKE THE STOP A GOOD STOP.

DO YOU CONSIDER THIS TO BE A FULLY DEVELOPED ISSUE?

WELL, YOUR HONOR, IT TOOK -- WAS A VERY SHORT TIME THAT WE HAD THE DOCUMENTS. WE HAD GOTTEN THESE DOCUMENTS ON CD-ROM ON DECEMBER 1st AND WE HAD TO FILE OUR RULE 3.580 MOTION BY DECEMBER 4TH, THE FOLLOWING MONDAY. WE'VE READ THEM AS QUICKLY AS WE COULD.

TAKE MINUTE TO PLAY THIS ISSUE OUT. LET'S ASSUME YOU DID HAVE AN EVIDENTIARY HEARING ON THIS. GIVE US THE SCENARIO, THE BEST CASE SCENARIO FROM YOUR STANDPOINT, OF WHAT YOU WOULD HAVE PRESENTED AT AN EVIDENTIARY HEARING AND WHAT THE MANDATED LEGAL CONCLUSIONS WOULD HAVE BEEN AS A RESULT OF THAT.

WELL, WHAT WE WOULD HAVE PRESENTED WERE BASICALLY WHAT WE PUT IN THE INITIAL BRIEF. WE WOULD HAVE PRESENTED THE TESTIMONY OF TROOPER WILSON, WHO TESTIFIED ABOUT THE PATTERN OF DRUG PROFILING THAT WAS GOING ON AT THE TIME THAT HE WAS A TREERP. WE WOULD HAVE PUT ON STATISTICAL INFORMATION AS MUCH AS WE COULD POSSIBLY FIND REGARDING THE RACIAL PROFILING THAT WAS OCCURRING IN THIS PARTICULAR STATION, WHICH WAS THE MORRISTOWN STATION. IF YOU'LL LOOK AT STATISTICS THAT WERE AVAILABLE, IT WAS BETWEEN 84 AND 100% CHANCE THAT A STOP MADE BY THE TROOPERS AT THE MORRISTOWN STATION WERE RACIALLY MOTIVATED. AND THAT WAS BASED ON -- THAT WAS BASED ON THEIR OWN INTERDEPARTMENTAL STATISTICS THAT THEY WERE REPORTING TO THE DEPARTMENT OF JUSTICE.

ISN'T YOUR CLAIM, THOUGH, ENTIRELY LACKING IN ANY CASE-SPECIFIC PROOF THAT YOU HAVE?

NO, NOT NECESSARILY. BECAUSE I THINK YOU NEED TO LOOK AT THE TESTIMONY. AND OF COURSE, NO ONE HAD THE DOCUMENTS AT THE TIME TO ASK TROOPER MOORE THESE QUESTIONS.

THAT'S WHY I ASK IF YOUR CLAIM IS FULLY DEVELOPED.

THAT WOULD BE CERTAINLY SOMETHING WE'D DO AT AN EVIDENTIARY HEARING WAS TO ASK TROOPER MOORE THESE QUESTIONS. WERE YOU USING RACIAL PROFILING AT THE TIME? AND BASICALLY YOU CAN LOOK --

BUT THE CLAIM AT THIS POINT DOESN'T HAVE THAT PART OF THE EQUATION. ISN'T THAT CORRECT?

WELL, I TRIED TO PUT IN THAT THERE WERE DISCREPANCIES IN TROOPER MOORE'S TESTIMONY THAT AS FAR AS HIS TESTIMONY REGARDING WHAT HAD OCCURRED FIRST, WHETHER HE LOOKED AT THE DEFENDANTS BEFORE HE MADE THE DECISION TO PULL THEM OVER, WHETHER HE LOOKED AT THE LICENSE PLATE FIRST. AND THEN DROVE UP AND LOOKED AT THE TWO DEFENDANTS BEFORE DECIDING TO PULL THEM OVER. I CERTAINLY THINK THERE'S AN INDICIA THERE AND IT'S AWFULLY SIMILAR TO THE PROFILING THAT TROOPER WILSON DESCRIBED AS TO HOW THEY DID IT.

HAS THERE EVER BEEN ANY DISPUTE RAISED WITH REFERENCE TO THE LEGITIMACY OF THE CLAIM ABOUT THE LICENSE PLATE? THE POLICE CLAIM ABOUT THE LICENSE PLATE? HAS THAT EVER BEEN PUT IN DISPUTE?

I BELIEVE AT DEPOSITION, THE TRIAL ATTORNEYS TRIED TO GET INTO THAT.

BUT I MEAN, THERE HAS NEVER BEEN --

OF COURSE, THE MOTION TO SUPPRESS WAS DENIED SO --

BUT I MEAN FACTUALLY THERE'S NEVER BEEN ANY CLAIM THAT THE OFFICER WASN'T CORRECT IN --

NO, I DON'T THINK THE -- I DON'T THINK DEFENSE ATTORNEYS HAD A REASONABLE BASIS REALLY BESIDES WHAT THEY'D BEEN GIVEN BY THE STATE TO MAKE ANY INQUIRY INTO IT. THEY'D BEEN GIVEN A PHOTOGRAPH OF THE CAR AND BASICALLY HAD NO REASON TO QUESTION THAT WHAT TROOPER MOORE WAS SAYING WAS NOT TRUCHLT IT WASN'T UNTIL WE GOT THESE NEW DOCUMENTS IN NOVEMBER THAT WE REALIZED THAT RACIAL PROFILING WAS EVEN OCCURRING IN 1983.

BUT THERE'S STILL NO CHALLENGE TO THE LICENSE PLACE ISSUE, IS THERE?

WELL, WE DID RAISE IT IN THE CONTEXT OF OUR INITIAL BRIEF BUT PRIOR TO THAT TIME IT HAD NOT BEEN RAISED EXCEPT IN THE MOTION TO SUPPRESS. BY THE DEFENSE ATTORNEYS THERE. AND AGAIN, I DON'T KNOW IF ANY REASON WHY THEY WOULD HAVE CHALLENGED THAT, OTHER THAN JUST TO SAY THAT HE DIDN'T HAVE A GOOD FAITH BASIS FOR PULLING THEM OVER. BUT THEY HAD NO REASON TO BELIEVE THAT THERE WAS ANY OTHER REASON THAT TROOPER MOORE WAS LOOK AT THESE TWO MEN, BESIDES THE FACT THAT THERE WAS A MOTOR VEHICLE VIOLATION. IT WASN'T UNTIL THESE DOCUMENTS AND REALLY THIS PROFILING ISSUE CAME TO LIGHT IN NOVEMBER THAT THERE WAS A GOOD FAITH BASIS TO BELIEVE THAT THAT HAD EVEN OCCURRED IN THIS CASE. AND/OR THAT THEY WERE EVEN IN A GROUP, AN ETHNIC GROUP, THAT WAS TARGETED AS A RESULT OF THIS RACIAL PROFILING. SO I DON'T THINK THERE REALLY WOULD HAVE BEEN A GOOD FAITH BASIS FOR THE TRIAL ATTORNEYS TO RAISE THE ISSUE.

YOU'RE IN YOUR REBUTTAL TIME MS. BACKHUS IF YOU WANT TO SAVE SOME.

YES, YOUR HONOR, I'M GOING TO SAVE MY REBUTTAL TIME. I WILL ADDRESS THE CLEMENCY ISSUE BRIEFLY IN MY REBUTTAL TIME. HOWEVER, I WILL RESERVE MY LAST FEW MINUTES FOR THAT. THANK YOU.

MR. LANDRY?

MAY IT PLEASE THE COURT, MY NAME IS BOB LOND RI REPRESENTING THE STATE ON THIS APPEAL ON THIS HABEAS RESPONSE. I'D LIKE TO CORRECT SOMETHING I MAY HAVE MISSTATED IN MY BRIEF AT PAGE 28. WE RELIED ON THE CASE OF STATE VERSUS DANIEL OUT OF THIS COURT FOR THE PROPOSITION THAT THE TEST TO BE APPLIED ON THE STOP IS WHAT A REASONABLE OFFICER WOULD DO UNDER THE CIRCUMSTANCES. SUBSEQUENT RESEARCH HAS INDICATED THAT DANIEL WAS OVERRULED BY THIS COURT IN A SUBSEQUENT CASE OF HOLLAND VERSUS STATE WHICH FOLLOWED THE FLORIDA REVIEW OF SUPREME COURT'S CASE IN WRENN WHICH REALLY ADOPTED A PER SE OBJECTIVE TEST THAT IF THERE WAS PROBABLE CAUSE TO EFFECTUATE THE STOP THEN THAT'S THE END OF THE MATTER. SO WE'D ASK THE COURT TO IGNORE ERRONEOUS CITE WE PUT IN OUR BRIEFS. I DON'T THINK IT CHANGES OR ALTERS THE POSITION WE'VE TAKEN WITH RESPECT TO THE STOP. AS WE'VE ARGUED IN OUR BRIEF AS PRESENTED TO THE LOWER COURT, REALLY THERE IS NO PARTICULAR CLAIM THAT THE DEFENDANT CAN MAKE AT THIS TIME. THE DEFENDANT BOTH HE AND HIS CO-DEFENDANT, COLLEAGUE MR. PUIATI, WERE BOTH CAUCASIAN. THERE WAS A MOTION TO SUPPRESS LITIGATED AT THE TIME OF TRIAL. IN ANSWER TO JUSTICE PARIENTE'S QUESTION A MOMENT EARLIER, I BELIEVE THE CO-DEFENDANT PUIATI RAISED THE QUESTION ON APPEAL AS TO LEGITIMACY OF THE STOP AND AS TO WHETHER OR NOT THERE WAS PROBABLE CAUSE TO EFFECTUATE THE ARREST. AND THIS COURT RULED IN THAT DIRECT APPEAL THAT THERE WAS PROBABLE CAUSE TO MAKE THE ARREST AND ESSENTIALLY, WROTE AN OPINION INDICATING THAT NO EXTENDED DISCUSSION WAS NEEDED ON THAT POINT.

LET ME EXPLORE THIS SCENARIO. A CAUCASIAN MALE AND AN AFRO-AMERICAN MALE TRAVELING IN A CAR AND IT IS STOPPED. LET'S ASSUME THAT THE REASON FOR THE STOP IS RACIAL PROFILING. CAN THE CAUCASIAN MALE AVAIL HIMSELF OF THE SAME DEFENSES THAT

THE AFRO-AMERICAN MALE WOULD BE ABLE TO?

WELL, IT WOULD DEPEND ON WHAT HIS I GUESS WHAT HIS CLAIM IS. I MEAN, OBVIOUSLY HE'S GOT A RIGHT TO HAVE -- TO HAVE HIS 4TH AMENDMENT RIGHTS HONORED. IF HE'S BEING STOPPED WITHOUT PROBABLE CAUSE, WITHOUT REASON. I MEAN, I DON'T SEE THAT HE FALLS INTO THE CATEGORY FOR EQUAL PROTECTION IF HE CAN MAKE SOME KIND OF AN ASSERTION THAT HIS EQUAL PROTECTION RIGHTS HAVE BEEN VIOLATED. I DON'T KNOW EXACTLY HOW HE COULD GO ABOUT DOING THAT. WHAT WE HAVE HERE IN THIS CASE --

THE CAR THE RIDING IN WOULDN'T HAVE BEEN STOPPED AND 10 KILOS WOULD NOT HAVE BEEN FOUND ON ME BUT FOR RACIAL PROFILING.

SUPPOSE -- I DON'T UNDERSTAND WHAT THE CONNECTION WOULD BE. YOU HAVE A SITUATION HERE IN WHICH WHATEVER, WHATEVER A POTENTIAL NEW JERSEY POLICY MIGHT HAVE BEEN IN THE MID OR LATE '80s OR '90s HAS ANYTHING TO DO WITH THE INSTANT CASE. YOU HAVE TROOPER MOORE, WHO WAS A BLACK OFFICER, STOPPING AN AUTOMOBILE DRIVEN AND RIDDEN IN BY TWO WHITE DEFENDANTS. AND THE REASON THAT HE GAVE AT DEPOSITION AND TRIAL IS THAT THERE WAS AN ILLEGIBLE LICENSE PLATE. AND APPARENTLY THERE IS NO DISPUTE THAT THE LICENSE PLATE IS ILLEGIBLE. THE TESTIMONY IS CLEAR THAT, YOU KNOW, THERE WAS NO IMPROPER BASIS, THERE WAS NO UNLAWFUL BASIS. IT CERTAINLY IS A VIOLATION OF THE NEW JERSEY TRAFFIC CODE TO STOP PEOPLE -- I MEAN, FOR IMPROPER DISPLAY OF A LICENSE TAG. AND OBVIOUSLY, UNDER THE TOTAL FACTS OF THE CASE WERE DMON ARE STRAIGHT, TROOPER MOORE DIDN'T KNOW THIS BUT THEY WERE ADVISING IN THE STOLEN VEHICLE OF THE VICTIMS. IF THE LICENSE PLATE HAD BEEN MORE LEGIBLE THEY WOULD HAVE BEEN APPREHENDED MORE QUICKLY BY AN OFFICER WHO DECIDED TO SIMPLY MAKE A CALL IN AND CHECK THE LICENSE.

COULD YOU ADDRESS JUST TO SHOW AS HYPOTHETICAL, LET'S SAY THAT A BLACK MALE WAS DRIVING THE VEHICLE AND A WHITE MALE WAS IN THE PASSENGER SEAT. AND IT WAS ESTABLISHED THAT THE VEHICLE WAS STOPPED SOLELY BECAUSE OF RACIAL PROFILING, I.E., THE RACE OF THE DRIVER, AND THE CAR WAS FROM FLORIDA, OR ANOTHER STATE. AND IT WAS ABLE TO BE ESTABLISHED AND DURING THE SEARCH AS JUSTICE SHAW HAS PUT IN THE HYPOTHETICAL, DRUGS WERE SEIZED AND THE PASSENGER AS WELL AS THE DRIVER WERE CHARGED. WOULD THE PASSENGER BE ENTITLED TO HAVE THAT EVIDENCE SUPPRESSED?

WELL, I THINK -- I'M NOT SURE. I THINK SOME OF THE LITIGATION THAT PERHAPS IS GOING ON IN NEW JERSEY INVOLVES DEFENDANTS WHO ARE MAKING CLAIMS, AND I DON'T KNOW THAT THERE ARE ANY WHITE DRIVERS THAT FALL INTO THAT CATEGORY OR NOT. I'D SIMPLY HAVE TO DEFER TO WHAT THE CASE LAW IS DEVELOPING IN THAT REGARD. IT WOULD SEEM TO ME THAT I DON'T KNOW HOW HE WOULD, YOU KNOW, COULD MAKE THE DEMONSTRATION THAT HE WAS --

WELL IF THE STOP WAS RENDERED ILLEGAL BY VIRTUE OF THE RACIAL PROFILING, THEN WOULDN'T THE PASSENGER WHO IS CHARGED WITH EQUAL POSSESSION OF THE DRUGS BE JUST AS ENTITLED TO THE BENEFIT OF THE SUPPRESSION OF THE FRUITS OF AN ILLEGAL SEARCH AS THE BLACK DRIVER?

WELL, I MEAN, I DON'T --

ISN'T THAT JUST ORDINARY 4TH AMENDMENT SUPPRESSION LAW?

WELL, BUT IN TERMS OF, SAY, THE SITUATION IN THIS CASE, IT'S THAT, YOU KNOW, THEY MIGHT BE ABLE TO MAKE A CLAIM THAT THE STOPPING WAS IMPERMISSIBLE. HOWEVER, OBVIOUSLY THEY WOULD HAVE NO INTEREST, NO VALID 4TH AMENDMENT INTEREST, IN THE PROPERTY THAT WAS SEIZED WHICH WAS PROPERTY OF THE DECEASED VICTIM. THAT WAS STOLEN PROPERTY.

I'M JUST ASKING YOU TO ADDRESS THE HYPOTHETICAL JUSTICE SHAW PROPOSED AS OPPOSED TO

-- IN OTHER WORDS, I ASSUME HE'S TRYING TO WORK TO THIS CASE BY FIRST USING THAT HYPOTHETICAL. AND I'M NOT SURE THAT YOU UNDERSTOOD OR ARE GOING TO ADDRESS THAT.

WELL, I THINK THAT ASSUMING, IF I UNDERSTAND THE QUESTION CORRECTLY, THAT THE BLACK DRIVER WAS STOPPED BECAUSE OF RACIAL PROFILING AND THERE WAS A WHITE OCCUPANT OF THE VEHICLE, WOULD HE HAVE A SIMILAR CLAIM TO CHALLENGE, TO CHALLENGE THE STOP AND THE EVIDENCE SEIZED? I MEAN, I DON'T KNOW THAT IT WOULD BE SO UNDER AN EQUAL PROTECTION ARGUMENT. IT MIGHT BE UNDER THE 4TH AMENDMENT OR SO.

I'M NOT SURE WHETHER FACTS IN THIS CASE WOULD, IF THEY'RE FULLY DEVELOPED, WOULD FIT INTO THE PATTERN, BUT I GATHER THIS IS WHAT THE DEFENDANT IS RAISING THIS ISSUE THAT YOU'RE DANCING AROUND. AND DON'T SEEM TO HAVE AN ANSWER FOR.

WELL, WE THINK FIRST OF ALL THAT, YOU KNOW, HIS CLAIM IS TIME BARRED. WE ALSO AS WE'VE INDICATED IN OUR BRIEF. WE ALSO THINK THAT WHATEVER HIS -- WHATEVER THE CLAIM IS WITH REGARD TO WHAT THE PRACTICE IS IN NEW JERSEY REALLY HAS NOTHING TO DO WITH THIS CASE. I MEAN, THEY DON'T MEET ANY OF THE CRITERIA OF ANY OF THE PROFILING THAT THEY'RE TALKING ABOUT. THEY'RE NOT -- THEY'RE CAUCASIAN. I MEAN, THE UF OFFICER TESTIFIED VERY SPECIFICALLY THAT THE WHOLE PURPOSE OF THE STOP WAS ILLEGIBLE LICENSE PLATE AND THERE SEEMS TO BE NO CHALLENGE AS TO THAT WAS A VALID -- A CORRECT SITUATION, THAT LICENSE PLACE WAS ILLEGIBLE AT THAT TIME.

BUT JUST SO WE UNDERSTAND WHAT WE'RE TALKING ABOUT WITH RACIAL PROFILING, MY UNDERSTANDING IS THAT ALTHOUGH UNDER THE WRENN CASE IN THE UNITED STATES SUPREME COURT, IF THERE'S A VALID REASON FOR A STOP, THEN YOU DON'T LOOK INTO THE OFFICER'S SUBJECTIVE MOTIVES.

THAT'S CORRECT.

THE WHOLE CLAIM OF RACIAL PROFILING IS THERE COULD BE THIS REASON LIKE A LICENSE PLATE WAS ILLEGIBLE. BUT WHAT WAS GOING ON IN NEW JERSEY WAS THAT IF YOU WERE A -- HAD CERTAIN KINDS OF CAR AND YOU WERE WHITE AND YOU HAD THAT SAME VIOLATION, YOU WEREN'T STOPPED. BUT IF YOU WERE BLACK, IT WAS A HIGH STATS CAT PROBABILITY THAT YOU WOULD BE STOPPED. AND THEREFORE THE IDEA OF WREN IS THE CLAIM IS MADE UNDER THE 14TH AMENDMENT NOT UNDER THE 4TH AMENDMENT. SO NOW WE ADDRESS -- MS. BACKHUS SAYS THAT SHE HAS ALLEGED THAT THE STOP WAS BECAUSE MR. PUIATI WAS DARK AND THE PROTECTED CLASS WOULD BE ITALIAN AMERICANS. IS THAT A CLASS UNDER THE EQUAL PROTECTION CLAUSE? IS THAT SOMETHING THAT'S A COLORABLE CLAIM?

I THINK WREN ALSO SAYS WE'RE NOT GOING TO MAKE INQUIRY INTO WHATEVER, IF THERE MAY HAVE BEEN SOME PRETEXTUAL MOTIVE IN STOP. THE STRICT QUESTION IS WHETHER OR NOT THERE WAS A PROBABLE CAUSE BASIS TO MAKE THE STOP. CLEARLY WE HAVE THAT HERE.

YOU'D SAY IF IN THIS CASE BOTH THE DEFENDANTS WERE AFRICAN AMERICANS AND THIS OCCURRED IN 1988, THAT IF THEY SAID THE LICENSE PLATE COULDN'T BE READ, IT WOULDN'T MATTER THAT THERE WAS VOLUMINOUS INFORMATION THAT THE MOST LIKELY REASON FOR THE STOP WAS THAT THEY WERE AFRICAN AMERICANS?

NO. I THINK -- I THINK AS A RESULT OF WREN, ASSUMING THAT THE LICENSE IS ILLEGIBLE, AND THE OFFICER IS MAKING HIS DETERMINATION TO STOP BECAUSE OF THAT LICENSE, IRRESPECTIVE OF ANY OTHER CONCOMITANT REASON THAT MAY BE GOING THROUGH HIS MIND THAT THAT AS FAR AS THE U.S. SUPREME COURT SAYS THAT'S THE END OF THE CASE.

DO YOU THINK WREN WOULD TRUMP A 14TH AMENDMENT CLAIM OF RACIAL PROFILING?

WELL, I THINK --

IN OTHER WORDS, IF A RACIAL PROFILING COULD ACTUALLY TAKE SCENARIO WHERE THE OFFICER ADMITTED, I STOPPED THEM BECAUSE THEY WERE BLACK, THAT'S WHAT WE WERE DOING THEN. THE LICENSE PLATE OBSCURITY OR WHATEVER WAS JUST A PRETEXT.

I THINK WREN TALKS ABOUT A LITTLE BIT THAT THERE MAY BE CERTAIN EXCEPTIONS TO ITS RULING BUT NONE OF WHICH WERE APPLICABLE IT SEEMED TO ME IN THE CASE OF BAR.

WREN SPECIFICALLY SAYS THAT THE CONSTITUTIONAL BASIS FOR OBJECTING TO INTENTIONALLY DISCRIMINATORY APPLICATION OF LAWS IS THE EQUAL PROTECTION CLAUSE, NOT THE 4TH AMENDMENT. THE CLAIM AS IT WOULD BE BROUGHT UNDER THE EQUAL PROTECTION CLAUSE THAT ALTHOUGH THE STOP WAS OTHERWISE VALID, IF THE DEFENDANT WAS A VICTIM OF IMPERMISSIBLE SELECTIVE ENFORCEMENT, THAT THERE MAY BE ANOTHER REASON TO FIND THE STOP TO BE INVALID. ISN'T THAT WHAT THESE CASES IN NEW JERSEY AND THE PRIOR UNITED STATES SUPREME COURT CASES HAVE HELD?

WELL, WREN, OF COURSE, I THINK WAS DEALING PRIMARILY WITH THE 4TH AMENDMENT AND 4TH AMENDMENT CONTEXT. AND -- BUT AGAIN, WE RETURN TO THE FACT THAT WHATEVER MAY BE THE POLICY IN REGARD TO NEW JERSEY AND WHAT THEY WERE DOING IN THE LATE '80s REGARDING MINORITIES REALLY HAS NOTHING TO DO WITH THE FACTS OF THIS CASE.

MS. BACKHUS SAYS IN THIS 91,000 PAGES THAT WERE JUST PRODUCED IN LATE NOVEMBER, EARLY DECEMBER FOR THE FIRST TIME, THERE'S INFORMATION THAT PRACTICES WERE GOING -- WERE BACK TO THE EARLY '80s. DO YOU AGREE WITH THAT ASSERTION THAT BEFORE THE RECENT PRODUCTION, THERE WAS NO EVIDENCE THAT PRACTICES SUCH AS IMPERMISSIBLE PROFILING WERE OCCURRING IN THE EARLY 1980s AND THAT FURTHER THAT THESE DOCUMENTS SHOWED THAT THE TARGETED INDIVIDUALS INCLUDED PERSONS OF ITALIAN-AMERICAN DESCENT AND OTHER SIMILAR ETHNIC ETHNIC --

WELL, I'M NOT GOING TO AGREE -- I DON'T KNOW IF THE -- I'M NOT GOING TO AGREE THAT WHATEVER ALLEGED IMPROPER PRACTICES WERE GOING ON, THAT THEY PREDATE -- GO ALL THE WAY BACK TO EARLY 1980s. I THINK THE DOCUMENTATION THEY'VE SUBMITTED IN THEIR EXHIBITS TALK ABOUT PRACTICES STARTING I GUESS IN THE MID '80s AND I DON'T KNOW THAT, YOU KNOW, THAT ANYTHING -- WHATEVER THE ALLEGED IMPROPER PRACTICES WERE PREDATED THAT AND WENT BACK WAY BACK WHEN TO THE EARLY 1980s THAT WE HAVE IN THIS CASE.

WOULD YOU ADDRESS THE HABEAS ISSUE?

YEAH. AS TO THE ESSENTIALLY HE'S PRESENTING AN ESPINOZA CLAIM AT THIS TIME AND AS WE'VE ARGUED IN OUR RESPONSE, THIS COURT HAS CONSISTENTLY HELD THAT SUCH CLAIMS ARE PROCEDURALLY BARRED UNLESS A DEFENDANT BOTH OBJECT AT THE TIME OF TRIAL AND SUBMITS A PROPOSED INSTRUCTION TO THE COURT FOR CONSIDERATION. AND THAT ALSO RAISES A CLAIM ON DIRECT APPEAL. MR. GLOCK DID NOT RAISE HIS CLAIM ON DIRECT APPEAL. IT WAS SOME KIND OF A MILD OBJECTION AT THE TIME OF TRIAL. HE DID NOT RAISE IT AS AN ISSUE ON DIRECT APPEAL, AND THE UNANIMOUS CASE LAW OUT OF THIS COURT ON THIS ISSUE WAS THAT THE CLAIM WAS PROCEDURALLY BARRED. HE'S CLAIMING THAT HE IS BEING TREATED SIMILARLY OR DIFFERENTLY OR UNFAIRLY IN COMPARISON TO MR. DAVIDSON JAMES. DAVIDSON JAMES, ON THE OTHER HAND, DID PRESERVE THE ISSUE BOTH AT TRIAL AND ON APPEAL. HE'S MORE SIMILARLY SITUATED IT SEEMS TO STATE TO MR. LAMBRECHT'S. MR. LAMBRECHTS RETURNED TO THIS COURT WHILE HIS FEDERAL HABEAS WAS PENDING AFTER THE ESPINOZA DECISION CAME OUT. AND CLAIMED WHAT ABOUT ESPINOZA? HE WANTED THE BENEFIT OF ESPINOZA? THIS COURT WROTE AN OPINION AND REJECTED HIS CLAIM SAYING HE WAS PROCEDURALLY BARRED BECAUSE HE FAILED TO RAISE THE ISSUE ON DIRECT APPEAL. I BELIEVE ANOTHER DEFENDANT, DAVID JOHNSTON, WAS IN A SIMILAR SITUATION, THAT HIS CASE WAS RETURNED TO HIS COURT

WHILE IT WAS IN THE FEDERAL -- GOING THROUGH FEDERAL AVENUE. AND CLAIMING THAT HE WANTED BENEFIT OF ESPINOZA. AGAIN THIS COURT APPLIED THE PROCEDURAL BAR IN HIS CASE AND DENIED RELIEF.

WHAT DO YOU SAY ABOUT THE PETITIONER'S CONTENTION THAT THIS RULE APPEARS TO BE ARBITRARY AND UNREASONABLE?

I SAY IT'S NOT ARBITRARY, IT'S NOT UNREASONABLE. HE'S IN ESSENCE ASKING THAT ALL PROCEDURE URAL DEFAULTS BE OVERTURNED AND THAT IN ESSENCE YOU CAN RAISE ANY ISSUE AT ANY TIME AND THAT REALLY, THERE'S NO NO --

WHAT ABOUT THE PARTICULAR ASSERTION THAT SAYS SINCE OUR LAW WAS SO CLEAR AND THAT WE CERTAINLY DISCOURAGED THE FILING OF FRIVOLOUS ISSUES ON APPEAL, THAT IT WASN'T UNREASONABLE FOR HIS ATTORNEY HAVING BEEN TOLD BY THIS COURT THAT THERE WAS NO MERIT TO THAT CLAIM, NOT TO RAISE IT. AND, IN FACT, THERE WAS PERHAPS AN ETHICAL OBLIGATION NOT TO RAISE IT, THAT IS, THAT IN ORDER TO BE AN ETHICAL LAWYER AND NOT RAISE FRIVOLOUS CLAIMS, THAT THIS COURT HAD SAID HAD NO VALIDITY.

I THINK THAT'S BELIED BY THE FACT THAT IN THE ACTUAL PRACTICE IS THAT ATTORNEYS WERE RAISING ESPINOZA CLAIMS, AND TRYING TO SEEK TO GET THE LAW CHANGED, AND THE REST OF IT. THAT HE -- THAT COUNSEL SIMPLY CHOSE TO RELY ON DIFFERENT POINTS IN ORDER TO WHAT HE THOUGHT TO PREVAIL, YOU KNOW, IS SOMETHING THAT ALL LAWYERS DO ALL THE TIME. IT'S NOT OBVIOUSLY ALL LAWYERS HAVE TO MAKE CHOICES AS TO WHAT ISSUES TO RAISE, AND IT'S OBVIOUS THAT SOME TRIAL ATTORNEYS, SOME APPELLATE ATTORNEYS, ARE CONTINUING TO LITIGATE AND ASSERT ESPINOZA IN ORDER TO GET THE CASE RESOLVED.

WELL, COUNSEL HAD BEEN CLAIMED TO BE INEFFECTIVE FOR INSTANCE AND NOT RAISING THAT CLAIM ON APPEAL, WOULDN'T THAT CLAIM HAVE BEEN REJECTED OUTRIGHT ON THE BASIS THAT COUNSEL COULDN'T HAVE BEEN INEFFECTIVE IN NOT RAISING IT BECAUSE THE LAW WAS SO CLEAR THAT IT'S NOT A VALID CLAIM.

THAT WAS ONE OF THE HOLDINGS I THINK IN LAMBRECHTS AND RELATED CASE THAT COUNSEL IS NOT INEFFECTIVE FOR FAILING TO ANTICIPATE THE LAW. BUT ON THE OTHER HAND, HE'S NOT INEFFECTIVE IN THE OTHER RESPECT EITHER.

DOESN'T THAT END UP BEING SORT OF A CATCH 22?

WELL, NO. I MEAN, I THINK IF YOU WANT TO SIMPLY TAKE THE POSITION THAT, YOU KNOW, I DIDN'T THINK WE WOULD WIN ON A MOTION TO SUPPRESS A CONFESSION SO WE DIDN'T RAISE IT AND THEN SYKES COMES INTO EFFECT AND A DEFENDANT MIGHT HAVE WON IF HE'D RAISED A MOTION TO SUPPRESS. I DON'T THINK THERE'S ANY UNFAIRNESS OR ARBITRARINESS AT ALL. I THINK THAT COURT HAS BEEN VERY CONSISTENT AND ACTED APPROPRIATELY IN ENFORCING ITS PROCEDURAL DEFAULTS. I MEAN, HE CAN -- DEFENSE COUNSEL CAN ALWAYS ASSERT ON APPEAL LEGITIMATE CLAIMS THEY THINK ENTITLE THEM TO RELIEF OR ENTITLE THEM TO FURTHER REVIEW IN THE U.S. SUPREME COURT IF THEY WANTED TO SEE THE LAW CHANGED. AND ON THE OTHER HAND, THEY CAN CHOOSE NOT TO. THAT DOESN'T MEAN THEY'RE INEFFECTIVE ONE WAY OR THE OTHER. I DON'T KNOW IF THE COURT HAS ANY QUESTIONS ABOUT THE CLEMENCY ISSUE. OBVIOUSLY WE'LL RELY ON THE BRIEF IN THAT RESPECT. I THINK THAT THE CONTENTION, THE CONTENTION WITH REGARD TO CLEMENCY MERITLESS BECAUSE HE HAD AN ATTORNEY AT CLEMENCY BACK IN 1987 WITH MR. DATE ON. MR. DATE ON PRESENTED ARGUMENT TO THEN GOVERNOR MARTINEZ AND THE CABINET. HIS COMPLAINT NOW THAT HE WOULD LIKE TO HAVE A COUNSEL APPOINTED AGAIN SEEMS TO ME HAS BEEN ANSWERED AND REPUDIATED BY THE PROVENZANO CASE.

I'D LIKE TO ASK A QUESTION ON THE PUBLIC RECORDS ISSUE. THE STATE ATTORNEY'S OFFICE FOR

THE 6TH CIRCUIT ASSERTED EXEMPTIONS ON THE BASIS OF THE ATTORNEY NOTES. WERE THOSE RECORDS RECORDS THAT WERE PREVIOUSLY SUBJECT TO A PUBLIC RECORDS REQUEST OR IS THIS A NEW REQUEST? IT'S AT ODDS WITH THE ISSUE WHETHER THE ATTORNEY'S NOTES WERE EXEMPT AT THIS POINT.

MY UNDERSTANDING WAS AND I GUESS A CLOSER READING OF MR. CROW'S COMMENTS AT THE HEARING WOULD BE THE BEST ANSWER. BUT MY RECOLLECTION IS THAT MR. CROW WAS SAYING THAT BACK IN 1987, THEY HAD PREVIOUSLY TURNED OVER 3,000 PAGES OF DOCUMENTS, ET CETERA, ET CETERA, AND THEY HAD ASSERTED SOME EXEMPTIONS AT THAT TIME, AND THAT WHAT HE WAS ASSERTING NOW WAS THE SAME AS THAT. AND I THINK THE MATERIAL WAS SUBMITTED TO JUDGE COBB, AND OBVIOUSLY THIS COURT CAN TAKE A LOOK AT IT TO DETERMINE IF THERE'S ANYTHING ABOUT THAT. BUT I DON'T THINK IT WAS ANYTHING ADDITIONAL.

THANK YOU, MR. LANDRY. TIME IS UP. MS. BACKHUS?

I WANT TO MAKE IT CLEAR TO THE COURT THAT MR. GLOCK DID NOT ASK FOR A SECOND CLEMENCY HEARING. THE CLEMENCY INVESTIGATION THAT TOOK PLACE IN MARCH WAS AT THE REQUEST OF THE GOVERNOR'S OFFICE. AND OUR POSITION IS THAT WHEN THE GOVERNOR ASKED AND INITIATED THE CLEMENCY PROCESS, HE TRIGGERED HIS OWN EXECUTIVE CLEMENCY RULES, WHICH REQUIRED THAT CLEMENCY COUNSEL BE APPOINTED, AND THAT CERTAIN OTHER REQUIREMENTS SET OUT IN HIS OWN RULES HAD TO BE FOLLOWED. AND THAT'S THE COMPLAINT. IS THAT WHEN THE GOVERNOR INITIATED HIS OWN RULES BY ASKING THAT ANOTHER CLEMENCY INVESTIGATION BE CONDUCTED, THAT MR. GLOCK SHOULD HAVE HAD THE OPPORTUNITY TO PRESENT THE NEW INFORMATION THAT HAD COME TO LIGHT SINCE HIS FIRST CLEMENCY HEARING, WHICH OCCURRED PRIOR TO ANY POST-CONVICTION PROCEEDINGS, PRIOR TO ANY DEVELOPMENT OF MITIGATING EVIDENCE, AND PRIOR TO KNOWING HOW THE FEDERAL DISTRICT COURT WOULD TREAT HIS ESPINOZA CLAIM, WHICH ALSO WAS SOMETHING THAT BECAUSE THERE WAS NO REMEDY IN THE COURT SYSTEM SHOULD HAVE BEEN BROUGHT FORWARD TO CLEMENCY BOARD'S ATTENTION. JUST AS --

WHAT HAD THE COURT SAID ABOUT THE AUTHORITY OF THE COURTS TO INTERFERE, I USE THAT WORD LOOSELY, WITH THE CLEMENCY PROCESS ONCE THE EXECUTIVE HAS DECIDED TO INVESTIGATE?

WELL, THE ONLY CASE THAT I COULD FIND THAT REALLY WAS ON POINT WAS OHIO VERSUS WOODARD.

DOESN'T THAT SAY THE OPPOSITE OF WHAT YOU'RE CONTENDING?

NO, ACTUALLY I THINK IT SAYS THAT JUDICIAL INTERFERENCE IS WARRANTED WHEN THERE IS AN ARBITRARY APPLICATION OF THE CLEMENCY RULE. IT'S SAY THAT YOU AREN'T GUARANTEED DUE PROCESS. BUT WHEN A CLEMENCY PROCEEDING IS GIVEN TO YOU, EVEN THOUGH YOU MAY NOT NECESSARILY BE ENTITLED TO IT, ONCE YOU'VE BEEN GIVEN THE OPPORTUNITY FOR A CLEMENCY PROCEEDING, THAT MEANS YOU ARE ENTITLED TO AT LEAST A MODICUM OF DUE PROCESS, BECAUSE IN OHIO, THEY FOUND THAT THE DEFENDANT STILL HAS A CONTINUING INTEREST IN LIFE.

HASN'T THIS COURT IN SEVERAL CASES STRICTLY ADD HERED TO SEPARATION OF POWERS AS FAR AS THE GOVERNOR'S CLEMENCY PROCEEDING?

IT CERTAINLY HAS. THE TWO CASES THAT COME TO MIND ARE BUNDY AND PROVENZANO AS FAR AS DISCUSSING CLEMENCY PROCEEDINGS THAT THIS COURT HAS ADDRESSED. AND IN BOTH OF THOSE INSTANCES IT WAS AT THE REQUEST OF THE DEFENDANT THAT HE WAS ARGUING THAT HE WAS ENTITLED TO A CLEMENCY PROCEEDING. AND IT WAS NOT THE OTHER WAY AROUND. ALSO, I

THINK THIS COURT DOES HAVE JURISDICTION TO GUARANTEE THAT ONCE THE CLEMENCY PROCESS HAS STARTED, AND THROUGH THE PROVISIONS SUCH AS TRIAL -- THE TRIAL COURT HAVING THE ABILITY TO APPOINT CLEMENCY COUNSEL, THAT CERTAIN DUTIES ARE TURNED OVER TO THE JUDICIARY AS FAR AS ENSURING THAT SOME TYPE OF DUE PROCESS IS AFFORDED THE DEFENDANT. AND IT'S OUR SUGGESTION THAT IT'S ALWAYS THE COURT'S RESPONSIBILITY TO ENSURE THAT DUE PROCESS IS ABIDED BY, PARTICULARLY WHEN THE GOVERNOR HAS INITIATED A PROCESS IN WHICH HE SET OUT A CERTAIN SET OF RULES. AND THAT'S OUR POSITION IN THIS CASE, WHICH IS A LITTLE DIFFERENT THAN PROCEEDINGS THAT HAVE BEEN IN FRONT OF THIS COURT BEFORE. BECAUSE IN BUNDY, PROVENZANO AND MANY OF THE PRIOR CASES, IT WAS ALWAYS THE DEFENDANT WHO WAS TRYING TO ASK FOR A SECOND SHOT. IN THIS CASE, IT WAS THE GOVERNOR WHO WAS ASKING THAT AN INVESTIGATION BE INITIATED. AND IT'S OUR POSITION WHEN THE GOVERNOR DID THAT, MR. GLOCK WAS ENTITLED TO COUNSEL SO THAT HE WOULD HAVE A VOICE IN PRESENTING THE MITIGATING EVIDENCE THAT WAS BROUGHT FORWARD AT THE FEDERAL DISTRICT COURT HEARING. THAT HE COULD BRING FORWARD THE ISSUE OF THE ESPINOZA CLAIM THAT HE HAD NO OTHER REMEDY UNDER THE LAW. SO THAT'S BASICALLY WHAT CLEMENCY WAS CREATED FOR, WHEN THERE IS NO OTHER REMEDY AT LAW.

DOESN'T AN EXECUTIVE LIKE THE LEGISLATURE INTERPRET ITS OWN RULES?

IT DOES INTERPRET ITS OWN RULES. BUT IN THIS PARTICULAR INSTANCE WHEN IT TURNS OVER CERTAIN FUNCTIONS SUCH AS THE APPOINTMENT OF COUNSEL TO THE JUDICIARY, IT'S OUR POSITION AS THEY HELD IN OHIO V. WOODARD THAT THE JUDICIARY HAS THE ABILITY TO INTERFERE TO BORROW JUST'S WORDS WITH THE PROCESS TO ENSURE THE PROCESS IS CARRIED OUT IN A FAIR WAY. AND IN THIS INSTANCE, FOR EXAMPLE MR. GLOCK WAS SUBJECTED TO PSYCHOLOGICAL TESTING AND ANY OTHER NUMBER OF THINGS THAT HE WAS ADVISED COULD HURT HIM. BUT AT THE SAME TIME, HE WAS NOT ENTITLED TO COUNSEL TO PRESENT ANY EVIDENCE ON HIS BEHALF TO ASSIST THE CLEMENCY BOARD IN REALLY GETTING A TRUE PICTURE OF WHAT MR. GLOCK WAS LIKE IN 2001 AS OPEN POSTED TO THE WAY HE WAS IN 1988.

JUSTICE SHAW?

COULD THE JUDICIARY TELL THE LEGISLATURE: YOU ARE NOT INTERPRETING YOUR RULES IN A FAIR WAY? OR THEY SHOULD BE INTERPRETED IN A DIFFERENT MANNER? IS THAT WHAT YOU'RE ADVOCATING? THAT THERE IS A POINT THAT JUDICIARY CAN SAY THAT.

I THINK YOU CAN, PARTICULARLY UNDER OHIO V. WOODARD WHICH SAYS THAT YOU CAN ENSURE THAT DUE PROCESS IS CARRIED OUT, PARTICULARLY IN A DEATH PENALTY CASE WHERE THIS COURT HAS AT LEAST SOME INTEREST AS FAR AS ENSURING THAT COUNSEL BE APPOINTED WHEN THAT FUNCTION IS TRIGGERED. THAT THIS COURT HAS THE ABILITY TO GO IN AND SAY, "WAIT A MINUTE. YOU HAVEN'T FOLLOWED YOUR OWN RULES. THERE IS A MODICUM OF DUE PROCESS THAT MR. GLOCK'S ENTITLED TO AND YOU NEED TO GIVE HIM COUNSEL SO HE CAN RAISE HIS CLAIMS IN FRONT OF THE CLEMENCY BOARD." OTHERWISE, HE HAS NO OTHER REMEDY AT ALL. THAT'S WHAT BASICALLY THE EXECUTIVE FUNCTION WAS, WAS KIND OF A CATCH-ALL TO CORRECT ANY MISCARRIAGES OF JUSTICE THAT THE JUDICIARY COULD CATCH.

THANK YOU, MS. BACKHUS.

THANK YOU.

THANK YOU, COUNSEL FOR YOUR ASSISTANCE. THE COURT WILL BE IN RECESS.